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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

REPLY COMMENTS
OF THE
CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

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SUMMARY

The record in this proceeding demonstrates that the level of competition existing within the commercial mobile services marketplace necessitates maximum forbearance from Title II regulation of commercial mobile service providers. Such a result is consistent with Congressional intent to ensure that consumers are properly protected and that the public interest is otherwise furthered, and will also help to ensure the continued dynamism of the market. Moreover, there is no need to impose disparate regulation among services comprising the commercial category.

The record also demonstrates that commercial mobile services should be broadly defined to encompass all services satisfying the statutory definition and their functional equivalents. A broad commercial mobile services definition will ensure that artificial disparities do not develop over time among similar services, and thus Congress' intent to establish regulatory parity will be achieved. The commercial category should include all current common carrier services, enhanced specialized mobile radio ("SMR") and all other "functionally equivalent" SMR services, paging and most personal communications services ("PCS") applications. The private category, then, should include only those services falling outside of the commercial category.

Finally, the level of competition existing within the commercial mobile services marketplace dictates against imposing equal access obligations on PCS and interconnection requirements upon commercial mobile services providers.

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CELLULAR TELECOMMUNICATIONS INDUSTRY ASSOCIATION

The Cellular Telecommunications Industry Association ("CTIA"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.[1] CTIA reiterates its strong support for a broad definition of commercial mobile services and for minimal Title II regulation of such services.

I. INTRODUCTION

The record reflects that Congress intended, through its statutory amendments under the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")[2], that all commercial mobile services should be subject to the same regulatory treatment. There is disagreement, however, concerning the extent of regulation

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[1] See Regulatory Treatment of Mobile Services, Notice of Proposed Rule Making in GN Docket 93-252, FCC 93-454 (rel. Oct. 8, 1993) ("Notice").

[2] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 392 (1993).

necessary in light of the mobile services marketplace and which services fit within the commercial mobile services classification.

To properly implement congressional intent and to promote the continued growth and dynamism of the market, all commercial mobile services should be subject to maximum regulatory forbearance, including relief from tariff obligations. The record clearly demonstrates that the mobile services marketplace is competitive and therefore appropriate for minimal regulation. In addition, there has been no adequate showing that commercial mobile services should be subject to disparate regulatory treatment.

Moreover, the Commission should reject any attempts to broaden the private mobile services category. Such action is not only contrary to congressional intent to treat functionally equivalent services alike but also potentially may skew the further development of competition to the extent that disparity among similar services develops. Thus, cellular and other common carrier mobile services, ESMR and "functionally equivalent" SMR services, paging services and most personal communications services ("PCS") applications necessarily fit within the commercial mobile services category.

Finally, the record demonstrates that PCS services need not be subject to equal access obligations and that commercial mobile service providers need not be subject to interconnection requirements.

II. ALL COMMERCIAL MOBILE SERVICES SHOULD BE SUBJECT TO MAXIMUM REGULATORY FORBEARANCE

A. All Tariff Obligations Are Unnecessary In Light Of The Competitive Mobile Services Marketplace

The record clearly demonstrates that because of the amount of competition currently existing in the mobile services marketplace, there is no need to impose tariff obligations upon commercial mobile service providers. Only three commenters, the People of the State of California and the Public Utilities Commission of the State of California ("CA PUC"), the New York State Department of Public Service ("NYDPS") and the National Cellular Resellers Association ("NCRA"), objected to the Notice's tentative conclusion to forbear from federal tariff regulation of the rates charged for commercial mobile services. Significantly, both the National Association of Regulatory Utility Commissioners ("NARUC") and the Public Service Commission of the District of Columbia ("D.C. PSC") -- the only other state regulatory entities to file -- did not object to removing federal tariffing obligations.

The arguments raised by the CA PUC in its recommendation to defer federal forbearance of tariff regulation are based solely upon its particular perspective on the cellular market in California.[3] CA PUC claims that there is not adequate competition in California to ensure "just, reasonable, and

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[3] See CA PUC Comments at 6-8 ("Given the lack of competition between the cellular carriers within California markets, the CPUC believes that it would be premature for the FCC to forbear tariff regulation of the rates for commercial mobile service provided to end users.")

nondiscriminatory rates," relying upon its observation that cellular "rates that were set nearly nine years ago have not fallen."[4]

CTIA respectfully submits that such assertions have no relevance to the instant proceeding. The CA PUC does not assert that cellular services exercise market power sufficient to justify federal tariff requirements; its "evidence" is limited to California. Given tariff filing requirements imposed on cellular carriers in California, the rates of these carriers may reveal more about the anti-competitive effects of tariff filing in a competitive market than about either carrier's market power.[5] Moreover, CA PUC's descriptions of the intrastate experience, nearly unique among the state public utility commissions, do not necessarily demonstrate a lack of competition. Economic studies show that cellular rates are approximately 5-16% higher in those states which regulate cellular prices; i.e., regulation "does not lead to lower prices in these markets."[6] Thus, regulation, and

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[4] Id. at 6.

[5] See CTIA Petition for Waiver of Part 61 of the Commission's Rules, Order in DA 93-196, 8 FCC Rcd. 1412, 1413 (1993).

[6] See Affidavit of Jerry A. Hausman, United States v. W. Elec. Co., Inc., Civil Action No. 82-0192 at 10 (July 29, 1992) ("Hausman affidavit"); see also Jerry A. Hausman, "Section C: Statement of Professor Jerry A. Hausman," submitted by PacTel Cellular et al. in its Phase II Response in the Public Utilities Commission of the State of California, Investigation on the Commission's Own Motion into the Regulation of Cellular Radiotelephone Utilities, I 88-11-040, at 18-19, 31-32; c.f. Alan D. Mathios and Robert P. Rogers, "The Impact of State Price and Entry Regulation on Intrastate Long Distance Telephone Rates," (continued...)

not the lack of competition, may explain the higher rates that are being complained of. CA PUC also does not address initiatives by Nextel Communications, Inc. ("Nextel") which recently activated its first digital mobile system in Los Angeles.[7] Finally, concerns raised that the cellular industry is subject to continued consolidation[8] are easily dispelled. Even with cellular services consolidation, two competitors remain in each market, both of whom compete vigorously for customers. Such concerns are also dispelled by the dynamic character of the mobile services industry, including the advent of ESMR services and PCS.

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[6](...continued)
Federal Trade Commission Bureau of Economics Staff Report (November 1988) (in states which permit pricing flexibility for AT&T, prices for intrastate interLATA toll service are approximately 7% lower than in states which regulate AT&T under traditional rate of return regulation).

[7] See Nextel, "Petition for Reconsideration in Gen. Docket 90-314," at 3 (November 18, 1993) (Nextel plans to cover most of California by early 1994) ("Nextel Petition").

[8] CA PUC Comments at 8. CA PUC also suggests that the FCC must ensure that consumers are not harmed when a commercial mobile service provider exits from a commercial market. Id. at 5. Because the commercial mobile services market is competitive, there is no need to impose any exit requirements, and indeed any exit requirement could disserve consumers by acting as an entry barrier. See Competitive Carrier Rule Making, Further Notice of Proposed Rule Making in CC Docket 79-252, 84 FCC 2d 445, 490 (1981) ("The presence of Section 214 barriers to exit may also deter potential entrants. The time involved in the decertification process may impose additional losses on a carrier after competitive circumstances make a particular service uneconomic. The cost of imposing artificial exit constraints is without any concomitant benefit in competitive markets, since reasonable alternatives are available to continue service. Furthermore, customers are free to protect their interests in advance by negotiating termination indemnification clauses in service contracts.")

NYDPS devotes less than half a page of its 17-page filing to state that it is "premature" for the FCC to forbear from regulating commercial mobile service rates, and offers no reasons for its assertion.[9] Such a blanket statement should not preclude the finding that the commercial mobile services are entitled to forbearance. As demonstrated earlier, the commercial mobile services market is competitive and no commercial mobile service providers exercise market power.[10] Thus, forbearance from tariff regulation is appropriate under the Budget Act.

NYDPS also asserts that because PCS licenses have not yet been issued, any FCC rate forbearance finding must necessarily be confined to existing mobile service providers.[11] Such an assertion is contrary to Congressional intent and sound policy. The Commission is required to complete its rule making to implement § 332 as it affects PCS licensing within 180 days of enactment of the Budget Act, and, within the same time, it must

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[9] NYDPS Comments at 11.

[10] See CTIA Comments at 30-34; see also Peter W. Huber, Michael K. Kellogg and John Thorne, The Geodesic Network II: 1993 Report on Competition in the Telephone Industry, at 4.3, 4.22-4.23, 4.129-4.130 and generally (1993) ("Competitive performance in radio services is robust, characterized by vigorous technological innovation, rapidly declining price, soaring demand on the consumer side, and frequent new entry among producers.") ("Geodesic II Report"); Report of the Bell Companies On Competition in Wireless Telecommunications Services, 1991, (October 31, 1991).

[11] See NYDPS Comments at 11.

also issue a final report and order for PCS.[12] A finding concerning which Title II obligations should be forborne should necessarily be made before that time. Furthermore, as a matter of policy, the addition of PCS providers into the commercial mobile service marketplace will only increase competition. Finally, the FCC's decision to license up to 7 PCS providers in each market further ensures that such providers cannot exercise unreasonable and/or discriminatory pricing behavior, especially considering their emerging nature.[13]

Finally, NCRA submits that while "the present record is clearly supportive of the conclusion that the public does not have access to a competitive cellular marketplace," it requests that facilities-based commercial mobile service providers need only file wholesale rate tariffs versus retail end-user rates.[14]

The Commission should reject NCRA's request for several reasons. First, NCRA's evidence in support of its underlying conclusion that the cellular marketplace is not competitive is flawed.[15] This proceeding conclusively demonstrates that

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[12] See 47 U.S.C. § 332(c)(1)(D), § 6002(d)(2)(A); see also Notice at ¶ 4; H.R. Conf. Rep. No. 103-213, 103rd Cong., 1st Sess. 491-492 (1993) (the report contemplates that the FCC complete a "rulemaking regarding the regulatory treatment of personal communications services prior to the issuance of licenses through competitive bidding") ("Conference Report").

[13] See Personal Communications Services, Second Report and Order in Docket 90-314, FCC 93-451 (rel. Oct. 22, 1993).

[14] NCRA Comments at 16-20.

[15] For example, NCRA selectively quotes from recent FCC and GAO conclusions which, at most, state that these

(continued...)

cellular services are competitive. Second, imposition of a requirement to file wholesale rates is neither contemplated by the Budget Act, nor has NCRA heretofore had any success in obtaining such a requirement from the Commission.[16] In any event, such a requirement is clearly beyond the scope of this proceeding as the Budget Act merely contemplates that current Title II obligations be grandfathered to the extent necessary to protect the consumer.[17]

On a related note, states petitioning to continue or to impose rate regulation upon commercial mobile services should be required, consistent with Congressional intent, to bear the

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[15](...continued)
organizations are unable to determine whether the cellular market is currently competitive, see NCRA Comments at note 10. Significantly, they do not state that cellular is not competitive. CTIA submits that the purpose and resultant effect of this proceeding demonstrates such competition. NCRA's reliance upon the Hazlett study of cellular competition, see NCRA Comments at notes 5, 11, is also unfounded considering its recent refutation. See John Haring and Charles L. Jackson, Strategic Policy Research, "Errors in Hazlett's Analysis of Cellular Rents," at 1 (September 10, 1993) (Hazlett's conclusions are wrong; evidence gathered can "be completely consistent with competitive behavior").

[16] See Petition for Rule Making Concerning Proposed Changes to the Commission's Cellular Resale Policies, Notice of Proposed Rule Making and Order in CC Docket 91-33, 6 FCC Rcd. 1719, 1725-1726 (1991).

[17] See 47 U.S.C. § 332(c)(1); see also Conference Report at 490-491 (the FCC has discretion to determine whether or not to enforce (but not alter) Title II provisions). Moreover, NCRA's suggestion that the Budget Act requires the Commission, for forbearance purposes, to "engage in particularized analysis of segments of the [commercial mobile services] marketplace and/or submarkets and individual carriers," see NCRA Comments at note 8, is unfounded. The legislative history relied upon by NCRA grants the FCC permissive power to examine individual carriers, but such a result is not required. See Conference Report at 491.

burden of proof.[18] The D.C. PSC proposes that states may regulate rates upon a showing of one of the following conditions: (1) that 15% of the basic service subscribers in a telephone exchange have access to such service only from a commercial mobile service provider; (2) that the commercial mobile service provider's rates for basic services are higher than the pre-existing landline carrier's rates; or (3) "that the commercial mobile service provider has market power in a relevant market."[19]

Each one of these proposed showings is flawed. The first showing should be rejected because a 15% threshold is neither contemplated by the statute, nor is such a bright-line test flexible enough to reflect the realities of the marketplace. Regarding the second showing, as an initial matter, current commercial mobile services, i.e., cellular and paging, are not substitutes for the traditional landline telephone exchange.[20] Thus, they have no comparable basic service rates. Furthermore, any showing based merely upon price will not adequately measure the market conditions necessary to demonstrate that rate regulation is necessary. Use of such a standard may also discourage commercial mobile service providers from offering higher quality, more-featured services in anticipation that the

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[18] See CTIA Comments at 36-39.

[19] See D.C. PSC Comments at 12.

[20] See Hausman affidavit, supra, at 20-21 ("landline telephone and cellular are in different antitrust markets"); Geodesic II Report, supra, at 4.133 ("mobile services occupy a market separate from stationary ones"); see also New Par Comments at note 13.

higher price will subject them to regulation.[21] Finally, the third standard is flawed for its reliance upon a "relevant market." Such a requirement will encourage piecemeal regulation as the "relevant market" will undoubtedly be too narrow especially when measured against Congress' concept of a commercial mobile services marketplace. For these reasons, the Commission should reject D.C. PSC's proposal.[22]

B. All Commercial Mobile Service Providers Should Be Subject To The Same Minimal Regulation

Several commenters suggest that certain services within the commercial mobile services classification should be subject to differential regulation based upon their ability to exercise market power and/or the amount of bandwidth allocated to such services.[23] For example, the National Association of Business and Educational Radio, Inc. ("NABER") advocates two classes of commercial mobile services which should be subject to disparate

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[21] At present, under the second standard, all cellular rates would be subject to state regulation, a result clearly contrary to congressional intent.

[22] The Commission should also reject D.C. PSC's proposal to permit states 15 days to respond to the comments submitted on their petitions. The statute does not contemplate any such response. See CTIA Comments at note 100.

[23] See Telocator Comments at 13-15 (tailor regulation to market conditions); Arch Communications Group, Inc. Comments at 10 (ensure like treatment within the narrowband and broadband classes); NYDPS Comments at 9-10 (ensure greater oversight for dominant versus non-dominant classes); PacTel Paging Comments at 7-9 (ensure like treatment within narrowband and wideband classes); Nextel Comments at 18 (ensure that PCS and ESMR services have customized regulation to maximize the development of diversity); CenCall Communications Corporation Comments at 4-5 (ESMR should be entitled to maximum Title II forbearance).

regulation: Commercial I/Open Entry and Commercial II/Limited Entry. The Commercial I class would consist of those commercial mobile service providers which can operate in a completely deregulated environment because of their clear non-dominance. Commercial II providers are those who have larger bandwidth or economic control and thus need more oversight.[24]

CTIA submits that the disparate treatment proposed above is unnecessary, and, in fact, may threaten the continued dynamism and growth of the commercial mobile service market. Due to governmentally-imposed entry restrictions, cellular is the most extreme case among the mobile services, yet the record demonstrates that such providers are competitive and do not exercise market power. It logically follows that other commercial mobile services, which do not face similar entry and other regulatory restrictions, are just as competitive as cellular.

Similarly, disparate treatment based upon bandwidth is unfounded. Such a distinction will not properly account for the consumer's perception of equivalence. If a customer perceives two mobile services as substitutes, its opinion will be unaffected by the amount of bandwidth allocated. Moreover, technological innovations mean that bandwidth need not act as a competitive constraint. For example, Telephone and Data Systems, Inc. ("TDS") notes that while a traditional SMR system has a capacity of 70 to 100 users per channel for voice applications,

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[24] NABER Comments at 14-17.

digital technology can enable that same channel to serve certain data service needs for about 3600 users.[25] In addition, Nextel claims that with less than 10 MHz of SMR spectrum, it offers a wide array of integrated services, including "advanced digital cellular telephone plus an alphanumeric pager, private network dispatch radio and full featured voice mail."[26] Disparate regulation based upon bandwidth, then, has the potential to create perverse incentives to forgo innovation in order to maintain a more favorable regulatory status, and also has the ability to foster protectionist versus competitive policies. Such results are impermissible in light of Congress' intent to maintain regulatory parity among functionally equivalent services. Thus, the case for disparity has not been made.

III. THE COMMERCIAL MOBILE SERVICES CATEGORY IS NECESSARILY INCLUSIVE

A. The Conference Report Fully Supports A Narrow Definition Of Private Mobile Services

The comments in this proceeding illustrate a fundamental disagreement over the breadth of the commercial and private mobile categories. As demonstrated below, the correct view is that the commercial mobile services category is inclusive at the expense of the private category.

In advocating a more inclusive definition of private mobile services, i.e., that the private mobile category includes

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[25] See TDS Comments at 9-10.

[26] See Nextel Petition at i, 3. Such services provide direct competition to both existing cellular and paging services.

services which meet the technical definition of a commercial mobile service, but are not its functional equivalent, commenters generally rely upon an example provided in the Conference Report.[27] According to this example, the Commission has discretion to determine that a service offered to the public and interconnected with the public switched network is not the functional equivalent of a commercial mobile service if such service does not employ frequency or channel reuse (or similar technologies) and has a limited geographic area.[28] As demonstrated below, heavy reliance upon this example to support an inclusive private mobile service definition is misplaced.

As noted by U S WEST, the Conference Report example does not even describe a service meeting the technical definition of a commercial mobile service -- there is no "for profit" offering.[29] Furthermore, this example employs permissive versus mandatory language, i.e., the Commission may consider such a service as not being the functional equivalent of a commercial mobile service, yet it is not required to do so. Finally, frequency reuse and geographic coverage are not necessarily determinants of

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[27] See, e.g., E.F. Johnson Company Comments at 7-8; RAM Mobile Data USA Limited Partnership Comments at 5-6 ("RMD"); Utilities Telecommunications Council Comments at 13-15; Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc. Comments at 7-8; Geotek Industries, Inc. Comments at 5-7 ("Geotek"); American Mobile Telecommunications Association, Inc. Comments at 13-14 ("AMTA"); Pagemart, Inc. Comments at 8-10 ("Pagemart").

[28] Conference Report at 496.

[29] See U S West Comments at 8.

functional equivalence. Under traditional understandings of functional equivalence, for example, "relevant market" analysis under antitrust law or "like" services for Title II discrimination analysis, the key criterion is customer perception. Technologies which increase a system's capacity may be useful, but the customer may not view such characteristics as controlling.[30] Moreover, with "seamless roaming" and call handoff and delivery technology, the geographic scope of current cellular and ESMR systems is less apparent to users.[31] Thus, limited geographic coverage does not necessarily hinder a finding of substitutability.

The primary impetus motivating support for an inclusive private mobile services classification may be an attempt to avoid application of the statutory alien ownership restrictions placed upon common carriers. CTIA submits that any such concerns regarding alien ownership can be better addressed through the § 310(b)(4)[32] waiver process versus the drastic, and potentially far-reaching, measure of reclassifying a service.[33]

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[30] Frequency reuse is just one technology which can enhance capacity. See Nextel Petition at 3, 10. Frequency hopping and advanced digital coding techniques are other equally promising spectrum enhancing technologies. See Nextel Petition, id.; CTIA Comments at note 46.

[31] In fact, these services provide nationwide coverage by linking individual markets.

[32] See 47 U.S.C. § 310(b)(4).

[33] Section 332(c)(6) also provides a limited waiver designed to grandfather existing alien investment in private mobile services subject to reclassification. 47 U.S.C.

(continued...)

Thus, as demonstrated here and in its Comments,[34] the proper conclusion is that the private mobile services category is narrow and necessarily excludes services meeting the commercial mobile services definition and their functional equivalents.

B. The Commercial Mobile Service Category Necessarily Includes SMR and Paging Services And Most PCS Applications

In its comments, CTIA analyzed the various facets of the commercial mobile services classification and advocated a broad, encompassing definition for such services.[35] CTIA takes this opportunity on reply to address commenters wishing to exclude SMR, paging and PCS from the commercial mobile services classification.

Several commenters, notably NABER and Geotek, take issue with classifying certain SMR services other than ESMR or wide area SMR as commercial.[36] NABER submits that a traditional SMR system which serves its customers' primary dispatch needs and is

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[33](...continued)
§ 332(c)(6). Moreover, the Conference Report clarifies that § 332(c)(6) "in no way affect[s] the Commission's authority under section 310(b)." See Conference Report at 495.

[34] See CTIA Comments at 11-14.

[35] See id. at 6-14.

[36] See NABER Comments at 12; Geotek Comments at 3-10; see also RMD Comments at 2-9; AMTA Comments at 13-15; Industrial Telecommunications Association, Inc. Comments at 5; Nextel Comments at 14-16; E.F. Johnson Comments at 4-5; Reed Smith Shaw & McClay Comments at 2-5.

interconnected merely on a secondary or de minimis basis (i.e., for fleet management) should not be reclassified as commercial.[37]

Any SMR services which satisfy the definition of a commercial mobile service or act as their functional equivalent must necessarily be classified as commercial mobile services.[38] Thus, while a taxi fleet dispatch operation which provides non-interconnected service (and is also not a functional equivalent) may be excluded from the commercial classification, other SMR services not so limited should be re-classified. Moreover, the fact that the licensee chooses to target its services to a specific user group does not, in and of itself, justify classification as a private mobile service.

Geotek maintains that services offered to small or specialized users are not available to the public or a substantial portion thereof.[39] It also supports a distinction between primary and secondary interconnection, i.e., when interconnected traffic exceeds "20% of the overall traffic," the

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[37] NABER Comments at 12. Similarly, RMD argues that only those SMR services which provide service competitive to cellular should be considered commercial mobile services. It also distinguishes between physical interconnection and interconnected service. RMD Comments at 2-5. CTIA submits that SMR services which meet Congress' statutory definition for commercial mobile services (or are a functional equivalent) are necessarily competitive with cellular services. Moreover, providing a customer with the capability to send and receive messages over the public switched network is sufficient interconnection.

[38] In other words, the Commission should apply the "quack" test of functional equivalence; i.e., if it looks like a duck, walks like a duck and quacks like a duck . . . .

[39] Geotek Comments at 3-4.

service should be classified as commercial mobile service.[40] Moreover, it contends that distinctions should also be drawn on the type of interconnection received; thus, indirect interconnection (i.e., through a PBX) should not be considered interconnected.[41]

CTIA submits that such distinctions are inconsistent with the statute and thus should be rejected. As CTIA explained in its comments,[42] licensee intent to target a specific user group should not be controlling. In addition, distinctions based upon primary versus secondary interconnection and/or the type of interconnection are unworkable. It would be administratively costly to monitor the percentage of interconnection or the type requested, and with no resultant competitive benefits. Moreover, a percentage restriction on the amount of interconnection would induce output restrictions in order to continue private status. Finally, since cellular carriers use both types of interconnection, any distinction based upon the type of interconnection received is meaningless. Thus, such distinctions should not be adopted.

Relying upon an artificial interpretation of "interconnected service," i.e., that the subscriber has no real-time, controlled access to the public switched network, several commenters, such as TDS and Pagemart, Inc., propose that paging services should be

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[40] Id. at 7-8.

[41] Id. at 8.

[42] See CTIA Comments at 9-11.

classified as private mobile services.[43] TDS also maintains that because paging services are a one-way service, private status is appropriate.[44]

As explained in its comments,[45] CTIA submits that the distinctions raised above are the by-products of a former era where classification as private carriage was crucial to the development of competition. To maintain such distinctions now concerning, for example, store and forward functions, would merely impose unnecessary costs, i.e., direct administrative costs, for example, in monitoring whether the interconnection was "real-time," and also unnecessary output restrictions, i.e., the incentive to delay implementing new technologies to maintain private status. Such costs, with their accompanying minuscule gain, would necessarily disserve both the regulated firm and ultimately the consumer.

Moreover, classifying paging as private merely because some of its current applications are one-way, would introduce a rather short-sighted view of its evolutionary capabilities (as well as discouraging efforts to take advantage of innovative technologies) into the regulatory process. Paging services no

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[43] See TDS Comments at 6-8, 14-16; Pagemart Comments at 5-10.

[44] TDS Comments at 7.

[45] See CTIA Comments at 8-9.

longer comprise their own separate market.[46] For example, BellSouth's IBM-developed "Simon" integrates cellular phone, wireless facsimile, pager and data communicator capabilities in one hand-held device.[47] And Nextel's Digital Mobile service offers similar combined capabilities.[48] Thus, to ensure the proper growth and development of all paging services, classification as commercial mobile service is proper.

Time Warner Telecommunications ("TWT") recommends that PCS should be presumed private unless specifically determined otherwise so that PCS is not artificially constrained and that the service is more responsive to customer demand.[49] This argument apparently ignores Congressional intent[50] as well as the upcoming auction process.[51] If PCS providers offer for-profit,

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[46] Since various data storage and information functions may be provided either through network capabilities or CPE-based functions, there is no clear means to carve out a separate market for network-based services. See United States v. NYNEX Corp., No. 93-3019, 1993 U.S. App. LEXIS 29123, at * 11-12 (November 12, 1993) (citing Department of Justice Triennial Review (1987)).

[47] See CTIA Comments at 22.

[48] See supra, note 26 and accompanying text.

[49] See TWT Comments at 4-5.

[50] See CTIA Comments at 17.

[51] See Implementation of Section 309(j) of the Communications Act Competitive Bidding, Notice of Proposed Rule Making in PP Docket 93-253, FCC 93-455 at ¶ 116 (the FCC expects "the principal use of PCS spectrum, considered as a class, is reasonably likely to involve the licensee receiving compensation from subscribers in return for enabling those subscribers to transmit or receive communications on frequencies on which the PCS licensee is authorized to operate;" thus PCS will be used such that competitive bidding procedures may apply); see also (continued...)

interconnected service to the public or a substantial portion thereof, or they are functionally equivalent to a commercial mobile service, then they should classified as commercial. Private designation, while permissible, should not be presumed.

C. All Commercial Mobile Service Providers Should Be Allowed To Provide Dispatch Services

Several commenters suggest that the restriction on common carrier dispatch should be removed only after the statutory three-year grandfathering period for reclassified commercial mobile services has ended.[52] CTIA submits that any restrictions on output placed upon the competitive commercial mobile service market will merely serve to hamper competition and the continued growth of the market. The marketplace should determine, to the maximum extent feasible, how scarce spectrum should be most efficiently employed.[53] Thus, a three year waiting period is unnecessary.

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[51](...continued)
Southwestern Bell Corporation Comments at 18-19.("private use [for PCS] would not fit into the auction scheme now being proposed").

[52] See, e.g., NABER Comments at 13 (transition period is necessary to avoid disruption for private land mobile services); Motorola, Inc. Comments at 13; Geotek Comments at note 7; AMTA Comments at 22 (transition period necessary for development of reclassified services to compete).

[53] For a discussion of the competitive benefits resulting from the removal of output restrictions, see CTIA Comments in Gen. Docket 90-314 at 8-20 (November 9, 1992).

IV. PCS PROVIDERS SHOULD NOT BE SUBJECT TO EQUAL ACCESS OBLIGATIONS

The record clearly demonstrates that equal access obligations need not be imposed on PCS providers. Such requirements are only necessary in situations where a firm possesses monopoly power.[54] As demonstrated above, because the mobile services market is competitive, consumer demand versus regulatory fiat should dictate the need for and extent of access.[55]

V. COMMERCIAL MOBILE SERVICE PROVIDERS SHOULD NOT BE SUBJECT TO INTERCONNECTION OBLIGATIONS

NCRA maintains that in order for the Commission to successfully achieve a competitive commercial mobile services marketplace, there must be "[o]pen entry to the underlying facilities of the spectrum licensed [commercial mobile services] carrier."[56] Thus, NCRA wishes to impose "expanded interconnection" obligations on commercial mobile service

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[54] See Geodesic II Report, supra, at 4.114-4.115.

[55] See Hausman affidavit, supra, at 25-28 (cellular reseller survey indicates that there is a lack of consumer demand for equal access to long distance providers; moreover, requiring Bell Operating Company ("BOC") cellular companies to provide equal access (with no concomitant obligations on non-BOC cellular companies) places the BOC providers at a regulatory disadvantage which decreases overall competition); Geodesic II Report, supra, at 4.115-4.116 (extending equal access obligations beyond the landline bottleneck into competitive mobile radio services produces anti-competitive effects; equal access does not appear to be a value to consumers; long distance mobile consumers realize significant pass-through cost savings when neither of the cellular providers is subject to equal access obligations).

[56] See NCRA Comments at 13.

providers upon which resellers can take advantage.[57] CTIA submits that such requirements should be rejected for the reasons stated below.

The Commission has selectively ordered interconnection obligations in those instances where it perceived market failure, that is, some imperfection in the marketplace which resulted in suboptimal outcomes. CTIA respectfully submits that no such condition obtains in the commercial mobile services marketplace, which as already discussed, is performing competitively. Given this, government intervention could artificially skew marketplace outcomes.

It is settled law that absent a monopoly, a firm is free to unilaterally choose to deal or decline to deal with others.[58] NCRA has provided no factual or analytical basis for departing from this general presumption. Ensuring the economic freedom of commercial mobile service providers to freely negotiate any interconnection arrangements (up to and including the right to decline the price offered) can and should be relied upon to maximize consumer welfare.

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[57] Id. at 9-13.

[58] See generally United States v. Colgate & Co., 250 U.S. 300, 307 (1919).